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October 10, 2002

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**By Hand Delivery**

Mackene H. Dortch  
Secretary  
Federal Communications Commission  
230 Massachusetts Avenue, N.E.  
Suite 110  
Washington, D.C. 20002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Amendment of Section 73.202(b),  
Table of Allotments, FM Broadcast Stations  
(Alva, Mooreland, Tishomingo, Tuttle,  
and Woodward, Oklahoma)  
MM Docket No. 98-155; RM-9082; RM-9133

Dear Ms. Dortch:

Transmitted herewith on behalf of Chisholm Trail Broadcasting Co., Inc., are an original and four copies of its "Reply to Opposition to Application for Review," filed in the above referenced proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,

DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP



Andrew S. Kersting  
Counsel for  
Chisholm Trail Broadcasting Co., Inc.

Enclosure

cc: Certificate of Service (w/ encl.) (by hand & first-class mail)

Noted by [unclear]  
10/10/02



Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Amendment of Section 73.202(b), ) MM Docket No. 98-155  
Table of Allotments, ) RM-9082  
FM Broadcast Stations ) RM-9133  
(Alva, Mooreland, Tishomingo, Tuttle, )  
and Woodward, Oklahoma) )  
  
To : The Commission

**REPLY TO**  
**OPPOSITION TO APPLICATION FOR REVIEW**

Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"), by counsel and pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. §1.115, hereby submits its reply to the "Opposition to Application for Review" filed September 27, 2002 ("Opposition"), by Ralph Tyler ("Tyler") in the above-captioned proceeding. In support of this reply, the following is stated:

**I. The FCC's Policy Regarding Consideration of Qualifying Issues in Allotment Proceedings Should Be Modified.**

**A. Tyler's Fraud Should Not Be Ignored.**

In his Opposition, Tyler continues his unwavering claim that his attempt to defraud the Commission is irrelevant to this proceeding and "should be disregarded." Opposition at 5. The Opposition states:

The Commission can impose sanctions on Tyler if it should so choose, but his qualifications have no bearing on the question of whether the allotment

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This reply is timely filed in accordance with Section 1.115(d) of the Commission's rules.

of Channel 259C3 to Tuttle, Oklahoma, results in a preferential arrangement of allotments.

*Id.*

Despite Tyler's effort to have the Commission focus solely on the technical considerations of his reallocation proposal, Tyler's attempt to defraud the Commission is inextricably intertwined with his proposal. Tyler attempted to deceive the Commission for the sole purpose of showing that KAZC had commenced on-air operation by the comment deadline in this proceeding.<sup>2</sup> Tyler's fraud goes to the very heart of his reallocation proposal because he intended to mislead the Commission into believing that KAZC constituted an adequate replacement service at Tishomingo, and, thus, that his proposal would result in a preferential arrangement of allotments. If the Commission were to ignore Tyler's fraud, the result in this proceeding would effectively reward Tyler for abusing the Commission's allotment processes. The Commission should not permit its policy of refusing to consider qualifications issues in allotment drop-in proceedings to effectively shield Tyler from facing the serious consequences of his egregious misconduct which demonstrates that he does not possess the basic qualifications necessary to remain a Commission licensee.

As demonstrated in Chisholm Trail's Application for Review, unlike the drop-in proceedings where the Commission's existing policy of refusing to consider qualifications issues in allotment proceedings was adopted, this is not a case where a proposed new allotment will be subject to competing applications and there is no guarantee that the wrongdoer will be the ultimate permittee. On the contrary, Tyler's reallocation proposal is *not* subject to competing applications. Moreover, Tyler's proposal to move his existing station from a small rural community near the Oklahoma/Texas border into an Oklahoma City bedroom community will

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<sup>2</sup> See Application for Review ("App. Rev."), Attachment D, Tyler Declaration at ¶4 (Tyler stated that the FCC comment deadline was approaching and he believed the best way to "answer questions posed by the FCC" was to get KAZC on the air).

instantly transform the station into a multi-million dollar facility. Thus, if the Commission were to uphold the grant of Tyler's reallocation proposal, Tyler's fraud would enable him to achieve a substantial pecuniary benefit by moving KTSH into the Oklahoma City market. Although a grant of the reallocation proposal undoubtedly would serve Tyler's personal financial interests, the fact that it was achieved only by defrauding the Commission would not serve the public interest.

Tyler's offer to accept "sanctions" for his wrongful conduct would not produce a satisfactory result in this proceeding. The record establishes that Tyler intentionally misled the Commission for the sole purpose of obtaining a grant of his reallocation proposal. Sanctioning Tyler for his disqualifying misconduct would not be an appropriate remedy because the reallocation of KTSH from Tishomingo to Tuttle will have become final, and, thus, Tyler would have attained the very goal he sought to achieve by defrauding the Commission.<sup>3</sup> Moreover, ignoring Tyler's fraud would have the unintended effect of providing a strong incentive for other Commission licensees to engage in similar misconduct. Indeed, for those licensees contemplating a similar reallocation proposal, paying a monetary forfeiture to the FCC might simply become part of the cost of moving a rural station into a larger urban area.

B. No Requirement to File Rulemaking Petition.

Tyler's suggestion that Chisholm Trail should be required to file a rulemaking petition in order to have the Commission consider modifying its policy of not considering qualifying issues in allocation proceedings is equally unavailing. Section 1.115(b)(2) of the Commission's rules expressly provides that an application for review may be filed for the

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<sup>3</sup> Chisholm Trail respectfully submits that Tyler's apparent willingness to pay a monetary forfeiture for lying to the Commission about the true nature of the KAZC/KTSH operation as of the comment deadline in this proceeding is a small price to pay to acquire a Class C3 facility in the Oklahoma City market.

purpose of seeking to have Commission precedent or policy overturned or revised. 47 C.F.R. §1.15(b)(2)(iii). Moreover, the Commission's policy of refusing to consider qualifying issues in the allotment context is not the result of a Commission policy statement or general rulemaking proceeding. The policy arose in the context of adjudicating specific allotment rulemaking proposals, which is the same context in which Chisholm Trail seeks to have it modified.

C. Consideration of Tyler's Fraud Will Not Result in a Flood of Character-Related Pleadings.

Contrary to Tyler's contentions, a change in the Commission's policy of not considering qualifying issues in the allotment context will not open the floodgates to consideration of character issues in allotment proceedings.<sup>4</sup> The circumstances in which qualifying issues should be considered in allotment proceedings are extremely rare, and would be limited to only those cases where, as here, the allotment proponent has attempted to obtain a grant of its proposal by defrauding the Commission. The cases would be further confined to reallocation proposals seeking to move an existing station from one community to another where there is no opportunity to file competing applications for the new allotment. Furthermore, it is well established that the Commission cannot permit parties to thwart the Commission's regulatory processes by defrauding the Commission in an effort to obtain favorable Commission action. *See generally WIOO, Inc.*, 37 FCC 2d 740, 742 (Rev. Bd. 1972) (abuse of process issue added where party procured and submitted documents to the Commission which were not

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<sup>4</sup> Tyler claims that consideration of his fraud in the context of this proceeding would result in the filing of pleadings in subsequent allotment proceedings that allegedly would "bring even the most insignificant matter to the Commission's attention in the hope of 'drawing blood.'" Opposition at 6-7. Tyler's alleged concerns have no merit. The Commission has made clear that it will not hesitate to take action against parties and their counsel for filing frivolous pleadings. *See Public Notice*, 11 FCC Rcd 3030 (1996) ("Commission Taking Tough Measures Against Frivolous Pleadings").

affidavits as he represented, and the purpose of his submission was to persuade the Commission into believing that the documents were properly sworn).

## **II. Tyler's Proposal Was Defective at the Time It Was Filed.**

Tyler filed his rulemaking petition proposing the reallocation of KTSH from Tishomingo to Tuttle, Oklahoma on March 21, 1997. The initial construction permit for KAZC was not granted until nearly seven months later, on October 14, 1997. *See* BPED-19970127MD. There can be no dispute that Tyler's rulemaking proposal was defective at the time it was filed because KAZC did not constitute a replacement service at Tishomingo prior to the issuance of its construction permit. Tyler's rulemaking petition should have been dismissed pursuant to the Commission's policy of refusing to accept petitions for rulemaking contingent on the actions of third parties. *See Cut & Shoot, Texas*, 11 FCC Rcd 16383 (Pol. & Rul. Div. 1996).

Tyler's reallocation proposal also was defective on August 28, 1998, the date the Commission issued its *Notice of Proposed Rule Making and Orders to Show Cause*, 13 FCC Rcd 25352 (MMB 1998) ("*NPRM*"), because KAZC had not yet commenced on-air operation. It was not until September 29, 1998 - less than three weeks before the comment deadline in this proceeding - that KAZC notified the Commission it had commenced program tests. The record in this proceeding is clear, however, that the only reason KAZC was able to commence program tests prior to the October 19, 1998, comment deadline in this proceeding was because Tyler took his own station off the air and lied to the Commission about the status of its operation. By Tyler's own admission, KAZC did not have its own transmitter, transmission line, or studio equipment as of the comment deadline.<sup>5</sup>

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<sup>5</sup> Tyler makes the rather dubious claim that "[a]lthough Tyler's statement concerning the reason KTSH was off the air was *incorrect*, there was no requirement that Tyler give any reason for KTSH being off the air." Opposition at 7, n.10 (emphasis added). Tyler's assertion raises the obvious question: if there was no obligation to inform the Commission as to the reason that (footnote continued on next page)

Despite Tyler's representation to the Commission that KTSH had suffered antenna failure and KAZC's corresponding representation that it had commenced program tests, the reality of the situation is that KTSH was operating on KAZC's noncommercial frequency with a single-bay antenna. There simply were not two operating radio stations in Tishomingo as of the comment deadline because there was only one transmitter, one transmission line, and one set of studio equipment at the KTSH/KAZC transmitter site/studio location. KAZC clearly did not constitute an adequate replacement service either at the time Tyler filed his proposal or as of the comment deadline in this proceeding. The Audio Division erred by considering KAZC's upgraded facility in this proceeding because it effectively permitted Tyler to cure his defective allotment proposal 4½ years after the comment deadline. *Caldwell, College Station and Gause, Texas*, 15 FCC Rcd 20641, 20642-43 (2000) ("*Caldwell*"). Permitting Tyler to cure his defective allotment proposal years after the comment deadline is especially egregious in this case because the record establishes that Tyler has controlled all aspects of KAZC's operation since before the station went on the air.

### **III. Section 73.515 Provides No Basis Upon Which to Grant Tyler's Reallotment Proposal.**

In the Commission's *1998 Biennial Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 15 FCC Rcd 21649 (2000), the Commission revised Section 73.515 of its rules to require noncommercial educational FM stations to provide a predicted 60 dBu signal to at least 50 percent of their community of license or 50 percent of the population within the community. *Id.* at 21670; *see also* 47 C.F.R. §73.515. Tyler claims that the Commission's revision to Section 73.515 of the rules constitutes a "change in circumstance"

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KTSH was of the air, why did Tyler lie to the Commission and claim that KTSH had suffered "antenna failure?"

that warrants reconsideration of the Allocations Branch's determination that KAZC does not constitute a replacement service.

Tyler's argument has no merit whatsoever. In the *Report and Order*, 16 FCC Rcd 1525, 1533 (MMB 2000), the former Allocations Branch denied Tyler's reallocation proposal because, *inter alia*, KAZC did not provide a city-grade signal to any portion of Tishomingo and provided a 60 dBu signal to only 23% of the area that received service from KTSH. The mere fact the Commission has established a minimum service floor for noncommercial stations is only marginally relevant in determining whether KAZC constitutes an adequate replacement service for KTSH. For example, if KAZC were to move to a new transmitter site such that it would provide a 60 dBu signal to only 50% of Tishomingo, it is beyond dispute that KAZC again would not provide a city-grade signal to any portion of the community. If this were to occur, and the Commission were to uphold the grant of Tyler's reallocation proposal, 50% of the Tishomingo residents be deprived of their only local radio service. Moreover, the entire Tishomingo community would be deprived of their currently existing city-grade service.

In *Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094, 7097 (1990) (*"Change of Community MO&O"*), the Commission stated that "[t]he public has a legitimate expectation that existing service will continue, and this expectation is a factor we must weigh independently against the service benefits that may result from reallocating of a channel from one community to another . . . ." As demonstrated above, the mere fact that Section 73.515 of the rules now requires noncommercial stations to provide a minimum level of service to their community of license does not establish, *ipso facto*, that KAZC constitutes an adequate replacement service at Tishomingo. Station KAZC could move to another transmitter site at any time and provide the minimum level of service to Tishomingo that would be more commensurate with that provided by the station at the time the *Report and Order* was issued



(i.e., no city-grade signal to any portion of Tishomingo and a 60 dBu signal to only 50% of the community). The change in Section 73.515 of the rules also does not provide any basis for consideration of KAZC's upgraded facility 4½ years after the comment deadline.

**IV. Tyler's Inability to Cure His Defective Allotment Proposal Until Long After the Comment Deadline is Due Solely to His Fraud.**

Tyler claims that his inability to cure his defective reallocation proposal until 4½ years after the comment deadline in this proceeding is the fault of Chisholm Trail. Specifically, Tyler argues that Chisholm Trail has "frustrated Tyler's plans for 4½ years" because Chisholm Trail has "persisted" in bringing Tyler's fraud to the Commission's attention, even though, in Tyler's view, his character misconduct is "outside the scope" of this proceeding. Opposition at 7. Tyler's contention that Chisholm Trail is to blame for the 4½ year delay in curing his defective allotment proposal is entirely without merit.

In his December 11, 1998, declaration, Tyler admitted that it had always been his intent to donate "the KTSH transmitter, transmission line, and studio equipment and the engineering services necessary to complete the KAZC installation" to KAZC, "but *because of the FCC deadline* I decided to do it sooner than I had planned." See App. Rev., Attachment D, Tyler Declaration at ¶4 (emphasis added). Although Tyler claims that Chisholm Trail prevented him from curing his defective allotment proposal until 4½ years after the comment deadline, it is abundantly clear that Tyler had plenty of opportunity to get KAZC on the air by the comment deadline, but chose not to do so. Indeed, because the comment deadline in this proceeding was October 19, 1998, Tyler had more than a year after the grant of KAZC's initial construction permit (on October 14, 1997) to put the station on the air. Instead, Tyler waited until a month *after* the NPRM was issued and three weeks prior to the comment deadline in this proceeding to "donate" KTSH's transmission and studio equipment to KAZC. Therefore, although Chisholm

Trail discovered Tyler's fraud and acted diligently in bringing it to the Commission's attention, Chisholm Trail is not responsible for the 4½ years that it took Tyler to upgrade KAZC.

Furthermore, the fact that Tyler always intended to "donate" KTSH's transmission and studio equipment to KAZC only underscores his intent to deceive the Commission. By his own admission, Tyler knew that KAZC had to commence on-air operation by the comment deadline in order to have any chance of constituting a replacement service at Tishomingo.<sup>6</sup> The fact that Tyler donated KTSH's equipment without having any additional equipment on hand for KAZC demonstrates that Tyler never intended for the two stations to operate simultaneously at Tishomingo. Despite Tyler's representations to the Commission, there never would have been two operating stations at Tishomingo had Chisholm Trail not discovered Tyler's fraud. If Tyler had intended for KTSH and KAZC to operate simultaneously from the same transmitter site, he would have provided KAZC with its own transmission and studio equipment long before the *NPRM* in this proceeding was ever issued. There would have been no reason to take his own station off the air and mislead the Commission into believing that there were two operating radio stations in Tishomingo.

#### **V. The *Second MO&O* Violates Principles of Administrative Finality.**

Tyler's nominal effort to distinguish *Com/Nav Marine, Inc.*, 2 FCC Rcd 2144 (Priv. Rad. Bur. 1978), *Central Florida Enterprises, Inc.*, 598 F.2d 37 (D.C. Cir. 1978), and *Caldwell*, 15 FCC Rcd 20641 (2000), demonstrates the precarious nature of his position. As demonstrated

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<sup>6</sup> Tyler's claim that the Allocations Branch "made new law" when it denied Tyler's allotment proposal "on grounds that KAZC did not place a 70 dBu signal over Tishomingo or replicate the facilities of KTSH" (Opposition at 8) is without merit. The Commission made abundantly clear in *Change of Community MO&O* that the public has a "legitimate expectation that existing service will continue." 5 FCC Rcd at 7097. Tyler failed to provide any authority for his contention that depriving 77% of the population in the Tishomingo area of their only existing local service would nevertheless constitute an adequate replacement service in that community. See *Report and Order*, 16 FCC Rcd at 1533.

in the Application for Review at pages 13-14, *Com/Nav Marine* and *Central Florida* are inapposite to the facts in this proceeding because the reconsideration orders at issue in those proceedings were issued to correct errors in the Commission's initial decisions, and were not based on a subsequent change in facts manufactured by the petitioner years after a procedural deadline. Moreover, the full Commission's decision in *Caldwell* makes clear that the Commission will not permit a rulemaking proponent to perfect its proposal after the comment date where it prejudices another party. In this case, consideration of KAZC's upgrade 4½ years after the comment deadline not only prejudices Chisholm Trail, but rewards Tyler for the fraud he has perpetrated on the Commission. Therefore, the Audio Division erred in considering KAZC's upgraded facility. *Caldwell*, 15 FCC Rcd at 20642-43.

WHEREFORE, in light of the foregoing, Chisholm Trail Broadcasting Co., Inc. respectfully requests that this Application for Review be GRANTED, that the *Memorandum Opinion and Order*, DA 02-1877 (released August 2, 2002), be REVERSED, and that the proposal to reallocate Channel 259C3 from Tishomingo to Tuttle, Oklahoma be DENIED.

Respectfully submitted,

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Attorneys for

CHISHOLM TRAIL  
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By:   
Andrew S. Kersting

October 10, 2002

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of October, 2002, a copy of the foregoing "Reply to Opposition to Application for Review" was hand-delivered or sent by first-class mail, postage prepaid, to the following:

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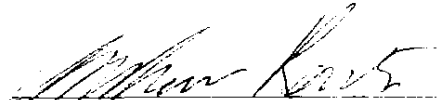
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